NO. 20145

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN MARSHALL,

Appellant,

vs.

GRANT SAWYER, et al.,

Appellees.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

WILLIAM B. BEIRNE
408 South Spring Street
Los Angeles, California 90014

A. L. WIRIN
FRED OKRAND
257 South Spring Street
Los Angeles, California 90012

Attorneys for Appellant

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Los Angeles, California 90012

Attorneys for Appellant

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Appellant, in this one brief, will reply first to the Reply Brief of the State appellees and, in the second part, to the Brief of the non-State appellees.

I

RESPONSE TO REPLY BRIEF OF THE STATE DEFENDANTS

A.

Preliminary Statement

Although appellees suggest (Br. 38) that "Plaintiff is guilty of a serious misstatement in stating to this Court that this is not a gambling case," the fact is precisely that: This is not a gambling case. It will be time enough, if ever the occasion should arise,

to test the validity of appellees' conduct or appellant's rights, if appellant should ever seek a gambling license, or seek to invest in a gaming casino, or buy a slot machine or try to place a bet at a dice table or even put a nickel in a slot machine. But that time is not now. This case is concerned with the validity of appellees' claim by use of the Black Book (Exh. 1), the accompanying letter (Exh. 3) and their conduct as shown by the evidence in this case to, in appellees' words (Br. 14), exclude appellant not only from gaming premises but also from "the hotel, golf courses, swimming pool, etc." 1/ The case has nothing to do with gambling; it has to do with the right of appellees to, for example, require the ousting of appellant from his room when he has retired for the night to sleep after having come to Las Vegas to give his deposition in a court case (RT 213-214). It is this kind of a right which is involved in this case and the case is not concerned, as appellees would have it (Br. 40, 25) with "our" "fragile" "gambling industry" (position of quoted words interchanged).

Accordingly, appellees' resume of the history (Br. 2-7) of gambling in Nevada, and the attention given to "gambling and closer supervision of licensees and investigation of applicants for licenses" (Br. 7), and their statements (Br. 8, 11) that the

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1/ A far wider exclusion is contemplated by appellees' action. There are 900 licensed establishments in Nevada with gambling devices (RT 433). Only 120 of these are resort hotels or large casinos without other facilities (ibid). This means that 780 are the drug stores, the service stations, etc., which have even a single slot machine (RT 428). These, too, in the language of appellees are known as gambling casinos (RT 428-429).

gaming industry is important to the economy of Nevada and requires strict supervision, present no facts nor offer any reason why the broadside tactic employed by appellees may stand.

Indeed, even if this be a "gambling industry" case, appellees have presented no facts -- but none -- justifying their infringement of personal rights.

B.

The Facts

Nowhere in its Statement of Facts (Br. 8-15) have appellees been able to point to any facts -- any overriding necessity -- for their startling broadside approach. This is so, of course, because there are no facts in the record which justify it. That gaming is an important industry to the economy of the State (Br. 8) and requires supervision (Br. 11), which apparently is the sum total of all the facts appellees can muster to justify their conduct, are simply not the kind of facts or showing needed to override personal constitutional right. If the kind of argument advanced by appellees -- that because an industry or activity is important to a State and requires supervision, this is sufficient factual showing to justify infringement -- were to prevail, this would virtually mean the end to personal constitutional rights. In California, for example, it would mean that the Department of Alcoholic Beverage Control could prevent homosexuals from being or congregating at a place where liquor is sold. But the law does not permit such reasoning. (Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d

313, 347 P. 2d 909; cf. United States v. Romano, ___ U. S. ___, 15 L. ed. 2d 210, 86 S. Ct. ___).

Appellees have referred to no facts in the record -- nor were there any adduced at trial -- showing any harm to the gambling industry from the presence of appellant or of other persons in the Black Book (or of similar persons, if one is to be permitted to use vague language) as paying customers for the accommodations which the hotels offer. And they certainly have not shown that whatever, even speculatively, harm may be said to result from appellant being permitted to gamble or be in the gaming area, cannot be accomplished by less drastic means than banishment from the entire premises.

Appellees take issue (Br. 8) with appellant's Statement of Facts (Op. Br. 2-11), but they do not point out how, in any way, it is inaccurate nor not supported by the evidence. Instead, appellees content themselves (Br. 8) with relying on the Findings of Fact made by the trial judge. Presumably, although they do not say so, appellees are relying upon Findings LIV and LV (CT 188), to the effect that appellees acted reasonably in classifying appellant as an undesirable person who should be excluded from gaming establishments in Nevada and that the exclusion from the entire premises was necessary to achieve effective enforcement of the gaming law and regulations. But appellees' reliance on these findings aid them not; reliance thereon begs the question. The Court made no findings nor any reference to facts which support them nor do appellees;

nor does the record. 2/

What appellees refuse to recognize is that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly, and thereby invade the area of protected freedoms." (NAACP v. Alabama, 377 U.S. 288, 307, 12 L.ed.2d 325, 84 S.Ct. 1302). See also, Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 1 L.ed.2d 796, 77 S.Ct. 752; Martin v. Struthers, 319 U.S. 141, 146-149, 87 L.ed. 1313, 63 S.Ct. 862; Cantwell v. Connecticut, 310 U.S. 296, 304-307, 84 L.ed. 1213, 60 S.Ct. 900; Schneider v. State, 308 U.S. 147, 161, 165, 84 L.ed. 155, 60 S.Ct. 146. The same principle was put this way by the Court in Shelton v. Tucker, 364 U.S. 478, 488, 5 L.ed.2d 231, 81 S.Ct. 247:

> " . . . [E]ven though the governmental purposes be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose."

Viewed in the light of this constitutional principle, it is

2/ The trial court's findings (CT 182-184) as to appellant's criminal record and reputation are not facts which show harm to the gambling industry from appellant's watching a golf tournament or eating lunch, nor do they furnish justification for attempting to prevent him from so doing. See e.g. Appellant's Op. Br. 45. It is interesting to compare appellees' statement (Br. 14) that appellant was "suspected of being with an organization that used 'muscle' tactics" with the same characterization of appellees' conduct here by the Nevada Attorney General (RT 445).

manifest that appellees did not even make the effort to meet it. As stated by appellees in their brief (p. 11), they hit upon the Black Book idea "from the sense of the public image of the State of Nevada and of its citizens; and also from the standpoint of the reaction that might (emphasis added) be expected from good customers in the gaming establishments." None of the record references gives any facts to support these fears and there is no evidence to show any deleterious effects which caused appellees to embark upon the program. Indeed, a reference to appellees' Exhibits B, C, and F would indicate that Nevada has grown apace with the rest of the country. 3/

Thus, when the whole matter is dissected and examined, it becomes clear that appellees' action was not based upon any improper operation of gambling establishments, or any reasonable fear that its licensing of gambling establishments or of licensees was not efficient enough to protect the public. No, it was a "matter of publicity" (RT 36). "The problem was to protect the good name of the legal gambling industry in the State of Nevada and, of course, the State of Nevada itself." (RT 33). For this, then, appellant became the scapegoat and appellees' broadside method ordained.

3/ Appellees' brief asserts (p. 11) that concern about the United States Attorney General having an interest in Nevada and particularly Las Vegas was also a factor contributing to appellees' program. This is an inadvertence on appellees' part. The evidence is that the interest, whatever that may mean or be, of the Attorney General, was not exhibited until after the Black Book and letter had been promulgated and distributed (RT 474).

C.

The Law

Perhaps the gist of the case is capsuled in appellees' statement (Br. 17) that they "assert a right to determine who may go on the premises of a licensed gaming house, whether it be on the golf course, the swimming pool, the hotel, restaurants, bars or gambling casino. In enforcement of this right they assert the collateral right to exclude from such premises all people who, in the judgment of the Nevada Gaming Control Board, can be classified as notorious or unsavory people and to advise the licensed gaming casinos of this classification and request them not to cater to these people." Assuming that appellees' asserted right just quoted, is to protect the good name of the gambling industry, as they claim, appellees have simply shot too wide. They have failed to fashion their remedy to meet their objective. See appellant's opening brief, pp. 40-42.

Appellees assert, without any evidence nor facts to back them up, that (Br. 19) "it is believed (emphasis added) that if Nevada does not find a suitable way to keep the hoodlum element away from the gaming industry that the entire industry is in serious jeopardy." This may or may not be the case. But in any event, more than belief is necessary before the State can interfere with an individual's right. And, as we have shown, more precise methods are required.

(1)

Appellant Was and Is By the Black Book and Appellees' Conduct Pursuant Thereto Denied a Federally Protected Right (Reply to Appellees' Point I, pp. 19-23)

We do not understand appellees' statement (Br. 19-20) that merely because the State need not permit gambling, its denial to some and permission to others cannot violate a federally protected right. In the first place, it again pre-supposes, incorrectly, as we have tried so hard to point out, that appellant is seeking the right to gamble. Again: that is not this case. But even if it were, the time is long since past where the State, under the guise of some concept of privilege, can avoid constitutional proscription. In Wieman v. Updegraff, 344 U.S. 183, 192, 97 L.ed. 216, 73 S.Ct. 215, a State case involving the question as to whether a University professor could be required to take a loyalty oath and who was discharged when he refused, the Court said:

> " . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory. . . . "

Accord: Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551, 100 L.ed. 692, 76 S.Ct. 637.

In Homer v. Richmond, 292 F.2d 719, 722 (CA DC 1961), the Court put it this way:

> " . . . One may not have a constitutional right to go

to Baghdad but the Government may not prohibit one from going there unless by means consonant with due process of law."

Cf. Gomillion v. Lightfoot, 364 U.S. 339, 347-348, 5 L.ed. 2d 110, 117, 81 S.Ct. 125: " '(A) constitutional power cannot be used by way of condition to attain an unconstitutional result.' "

Accordingly whether the State may prohibit gambling altogether is quite beside the point.

Moreover, we believe it perfectly clear that irrespective of what the Supreme Court may ultimately say is the right or lack thereof of an individual business man who is licensed by the State to do business with the public, to refuse to do business with some, there can be no doubt that the State has no right to so exclude. We suggest that with Aptheker v. Secretary of State, 378 U.S. 500, 12 L.ed. 2d 992, 84 S.Ct. 1659, making so clear what the Court had indicated to be the case in Kent v. Dulles, 357 U.S. 116, 127, 2 L. ed. 2d 1204, 78 S.Ct. 1113, namely that the right to travel is a constitutionally protected right, it can hardly be doubted that the right of the traveler to partake of public accommodations is likewise a federally protected right -- at least where the State seeks to take it away from one and not from all.

Appellees' reliance (Br. 20) upon Ah Sin v. Wittman, 198 U.S. 500, 49 L.ed. 1142 is misplaced. In the first place, in the light of recent Supreme Court decisions such as Lambert v. California, 355 U.S. 225, 2 L.ed. 2d 228, 78 S.Ct. 240, Smith v. California, 361 U.S. 147, 4 L.ed. 2d 205, 80 S.Ct. 215, Robinson v.

California, 370 U.S. 660, 8 L.ed.2d 758, 82 S.Ct. 1417, the validity of Ah Sin, in so far as it holds that it is not a violation of due process to punish innocent conduct, is seriously open to question. See, also, United States v. Moreno, ___ U.S. ___, 15 L.ed.2d 210, 86 S.Ct. ___. Moreover, the facts in Ah Sin were quite different from those here. Not only is this not a gambling case, and not only was gambling in Ah Sin itself illegal, but also "illegal" were the very "premises" where the gambling took place. Here, appellees assert the right to exclude not only from where the gambling takes place but from all the premises -- the dining room, lavatories, shops, etc. At least in Ah Sin, judicial proceedings had to be filed. Here appellees claim the right by ipse dixit.

Furthermore, in addition to the over-broadness concept of Aptheker, NAACP v. Alabama, and the other cases cited, supra, decisions like Thompson v. City of Louisville, 362 U.S. 199, 4 L.ed.2d 654, 80 S.Ct. 624, and Garner v. Louisiana, 368 U.S. 157, 7 L.ed.2d 207, 82 S.Ct. 248, make clear that the State has no right to seek to prevent an individual from just being in a public place of business, absent his making a disturbance, at least when he is there for the purpose for which the business is open. Cf. Shuttlesworth v. City of Birmingham, ___ U.S. ___, 15 L.ed.2d 176, ___ S.Ct. ___.

Nor does Wall v. King. 206 F.2d 878 (CA 1 1953) or Lewis v. United States, 348 U.S. 419, 99 L.ed. 475, 75 S.Ct. 415, aid appellees. This is not a licensing case; appellant seeks no license. With due respect to Judge Pope, concurring when this case was

previously before this Court, and relied upon by appellees (Br. 21), we respectfully point out that his views were not those of the Court and again, appellant's assertion is not (ibid) "that he cannot be excluded from a gambling establishment". Appellant's assertion is, similar to that in the sit-in cases, that he cannot be denied the right to get a cup of coffee at the restaurant or to buy a newspaper at the cigarette counter. Accordingly, appellees' reiteration (Br. 21) that "the privilege of going upon the premises of a licensed gaming establishment is a local privilege and . . . therefore" not Federally protected, disregards all the law made by those cases.

Neither Webb v. State University of New York, 125 F. Supp. 910 (ND NY 1954), app. dism. 348 U.S. 867, 99 L.ed. 683, 75 S. Ct. 113, nor Hamilton v. Regents of the University of California, 293 U.S. 245, 79 L.ed. 343, 55 S. Ct. 197, relied upon by appellees (Br. 22) is apposite. Both have to do with the operation of a state university, with the petitioners seeking to participate or have some part therein. Here involved, is freedom of movement, with appellant seeking to have no part of that which appellees are empowered to license.

The decision by this Court when the instant case was previously before it makes clear that this right of freedom of movemant will be and is protected under the Federal Constitution.

The Police Power Affords Appellees No Refuge From Their Conduct In Excluding Appellant From Non-Gambling Premises (Reply to Appellees' Point II, pp. 23-25)

The very citation, and reliance upon by appellees (Br. 23), of Flores v. Los Angeles Turf Club, 55 Cal. 2d 736, 361 P. 2d 921, demonstrates its lack of applicability here and the correctness of appellant's position.

Flores is not the case at bar. It is quite a different thing and the difference is demonstrated from the case itself. Appellees have failed to make the analysis required.

In the first place, in Flores, no one, and certainly not any state officials, had drawn up a list of named individuals. Moreover, the statute which authorized the California Horse Racing Board was very narrow and authorized exclusion only "from the enclosure where horse races are licensed by the board, or from specified portions of such enclosure." (emphasis added). This is a far cry from authorizing total exclusion from all the area on which a race track happens to be. Thus, for example, the statute did not purport to, and did not permit the exclusion of a person from the Los Angeles County Fair Grounds at Pomona or the State Fair at Sacramento, where all kinds of other attractions are offered -- live stock shows, agricultural exhibits, the mid-way, scientific displays, etc. -- in addition to horse racing. (See California Business & Professions Code §19561). Had the statute authorized, or the facts indicated, total exclusion from such a

place, the case would approach more closely that at bar.

Furthermore, the exclusion was not of so nebulous a class as "persons of notorious or unsavory reputation" (Exh. 3), but of persons who had been engaged in illegal activity concerning horse racing (bookmakers, touts and "persons who have been convicted of violation of [the California Horse racing laws] or of the laws prohibiting bookmaking or other illegal forms of wagering on horse races") -- in other words, illegal activity, closely -- no, intimately -- connected with the very industry being regulated. Appellees can make no such claim here. Indeed, through their counsel, they conceded to the trial court (RT 357): "I don't think Mr. Marshall's gaming activities would be the reason we would want to exclude him."

In addition, the regulations were specific and dealt with the business at hand, prohibiting persons to whom the regulation applied from participating in pari-mutuel wagering conducted under the jurisdiction of the Horse Racing Board 4/ and, as applied to the Flores case (55 Cal. 2d at 739, f. n. 2) meant persons convicted of violating a specific bookmaking law.

Additional difference between this case and Flores is the fact that the statute provided (ibid) for a hearing before the Horse Racing Board with court review. This is far different from the instant case where the appellees sat down and drew up a list of

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4/ This feature of the Flores situation points up the difference between this case and that, and emphasizes the correctness of appellant's contention that "this is not a gambling case".

named individuals without provision for even after-the-fact hearing, nor for court review. It is because of Flores' failure to exhaust his administrative remedies that the court said the trial court had properly dismissed plaintiff's injunction cause of action. Said the court (pp. 746-747): "In the face of so pervasive a system of administrative procedure, it would appear difficult to maintain that the Legislature did not intend that this system provide the exclusive initial recourse for persons aggrieved by the operation of its regulatory legislation. And, in similar instances, the courts have withheld judicial relief from those who have not first availed themselves of the administrative remedies provided."

Additionally pointing up the difference between Flores and the instant case is the California Court's recognition (p. 742) that "there exists no constitutional or common-law right of access to race tracks or other places of public amusement comparable to the right to accommodation at inns." And distinguishing previous California cases which had refused to approve license loss in the absence of improper conduct by persons on the premises themselves because (55 Cal. 2d at 743) "the state may not ... by the application of general statutory standards, require (licensees) to undertake actions not specifically related to the objective which the state desires to accomplish," (emphasis added), the Court pointed out (p. 744) that "the restriction imposed by the instant statute is not apparently unrelated past conduct of others, but a past conviction for closely related conduct of the regulated party himself." (emphasis added).

And the Court recognized (what is missing in the present case) that there were facts which justified even the specific classification there. Thus there were figures showing the loss of tax revenue to the State through illegal wagering activity. No such figures were presented at bar. Next, there were facts showing the recidivist records of convicted bookmakers. No such evidence was sought to be presented showing the recidivism, even if there could be such a thing, of "persons of notorious or unsavory reputation" (Exh. 3). Perhaps more importantly, the Court had before it facts showing conduct at the track itself, namely (55 Cal. 2d at 744) "the frequent use of the pari-mutuel windows by bookmakers to 'lay-off' portions of their bets in order to hedge themselves against the financial disaster of losing on a horse on which they have accepted a large amount in bets and in order to lower the odds on such a horse." No such on-the-spot deleterious conduct by appellant here nor any one else was ever intimated by appellees. Indeed, appellees themselves concede that appellant conducted himself properly (Br. 36) and the record is clear that this is so at all times throughout many years that appellant had been on the premises (e. g. RT 166, 173, 185, 191-192). And finally, the California Court had before it material showing "the difficulty of detecting among the large crowds ... those who are using (the betting windows) illegally, or who are improperly soliciting customers for illegal side bets." No such effort was made by appellees here. Indeed their very point is not the difficulty of detection, but the ease of detection and the bad image the state will get if appellant is known to be anywhere

on the premises (RT 33).

Accordingly, the Flores case does not argue for the validity of appellees' conduct here, but, on the contrary, demonstrates the invalidity thereof. Should appellees attempt a narrow procedure directly related to gambling, it will be time enough to consider whether they will have met the Flores standards. The instant case is not such.

Finnessey v. Seattle Baseball Club, 122 Wash. 276, 210 Pac. 679, cited by appellees (Br. 24) is inapposite. That case relates to illegal conduct in the ball park itself. Nor does State v. Baker, 50 Ore. 381, 92 Pac. 1076, apply. Age and sex classifications are in an entirely different category from the case at bar.

Appellees cannot prevail in this case by the boot strap argument (Br. 25) that because they have determined to embark upon the Black Book course, that settles the matter. As we have previously pointed out, appellees' conduct sweeps too broadly (see quotation under discussion of Facts, supra). Moreover, it is the law that when a State seeks to curtail individual liberty, it must make a showing and demonstration of a "subordinating interest" which is "compelling" (Schneider v. Irvington, 308 U.S. 147, 84 L.ed. 155, 60 S. Ct. 146; Sweezy v. New Hampshire, 354 U.S. 234, 265 [conc. op.], 1 L.ed. 2d 1311, 1331, 77 S. Ct. 1203; NAACP v. Alabama, 357 U.S. 449, 463, 2 L.ed. 2d 1488, 1500, 78 S. Ct. 1163). No such showing nor demonstration has been made here. Further, it is "incumbent upon (the state) to demonstrate that no alternative forms of regulation would combat" the evil.

(Sherbert v. Verner, 374 U.S. 398, 407, 10 L.ed.2d 965, 972, 83 S. Ct. 1790). This, appellees have failed to do.

(3)

The Failure To Provide For a Hearing Denies Due Process (Reply to Appellees' Point III, pp. 26-31).

Appellees can surely not justify their arbitrary unilateral conduct by urging failure to exhaust administrative remedies which did not and do not exist. And while the fact as to whether appellant knew he was in the Black Book prior to the week ending October 29, 1960 (Br. 26) is irrelevant, appellees must certainly know that they cannot argue, as they do (ibid), the facts to be just the opposite to what the uncontradicted evidence is (RT 223-225).

Appellees' reference (Br. 26-27) to "regulations" having to do with food handling, driving tractors on a highway, leash laws, driving while intoxicated is a non-sequitur. No citations to those regulations or statutes are given, but we know of no laws or regulations, and we doubt they exist, which say, for example, that John Doe may not walk his dog without a leash, or that Richard Roe may not drive a car while intoxicated. Fortunately that is not yet the permissible state of the law in this country and, so long as the Bill of Attainder provision is in the Constitution (Art. I, §10, Cl. 1), it will never be. 5/

5/ In this connection, it is significant that California in its statutory scheme which led to the Flores case, supra, provides that it is a misdemeanor for one to enter a horse racing enclosure after the administrative and court proceedings have been (Continued)

The importance of a hearing is demonstrated by appellees' bland use (Br. 27) of the term "police record". We suggest that such is simply not sufficient. Ghandi, too, had a "police record" and so does Martin Luther King, Jr. Nor, in appellant's case, does a single felony conviction almost 30 years before the Black Book, a misdemeanor conviction under an unconstitutional statute, and long past misdemeanor convictions (see Complaint, p. 7; RT 14) have persuasive bearing on appellees' asserted interest in protecting the good name of the gambling industry. We repeat, this is not a gambling case and appellant seeks no license from appellees. Suggestions that arrests on "suspicion" or for "investigation" or on "GP" (general principles; e. g. Exh. L) are probative, need not be dignified by comment. (Cf. Douglas, "Vagrancy and Arrest on Suspicion", 70 Yale L. J. 1; Staples v. United States, 320 F. 2d 817 [CA 5 1953]; see, also Flores v. Los Angeles Turf Club, 55 Cal. 2d 763, 748, 361 P. 2d 921).

Appellees' reference (Br. 27) to a supposed remedy in the Nevada state courts is made, of course, in disregard of the decision by this Court previously in this case (301 F. 2d 639) and also in disregard of Monroe v. Pape, 365 U. S. 167, 5 L. ed. 2d 492, 81 S. Ct. 473.

Similarly in disregard of our basic precepts, is appellees' attempted justification (Br. 27-28) based on the "'good guys'" versus "bad guys" concept. Appellees, lamentably, forget that "the rights

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5/ (Continued): exhausted and held against him (Calif. Bus. & Prof. Code §19574). And so, even with all its administrative procedures, California relies for enforcement on the due process method of the criminal court.

of good men are secure only so long as the rights of bad men are also protected." (Mathes, "A New Order of the Ages: Free Speech and Internal Security", Oct. 1959, ABA Jl. 929).

Nor does appellees' reliance (Br. 28-29) on Judge Pope's concurring opinion aid them. While laws may, indeed, be passed without hearing, the imposition of penalties may not be. Nor is the tractor analogy apt. That has to do with present illegal conduct. When one violates a valid general law, the state may provide that he -- not by name, but because he violated the law -- may be arrested and prosecuted therefor. But there is no authority, certainly without a hearing, to administratively decree that John Doe is engaged in illegal conduct. Indeed, with due respect, the misapprehension under which the concurring Judge was laboring is demonstrated by his caveat (Br. 29) that the trial Court "may well find that plaintiff's entry upon the gambling premises (a place not involved in this case) would present an emergency comparable to that presented by an animal running at large while suspected of being afflicted with the hoof and mouth disease." 6/ There is no

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6/ If this analogy to an animal afflicted with the hoof and mouth disease be correct, it would of necessity have to apply to the current licensees who had been "grandfathered" in by appellees, and who "formerly had unsavory reputations" (RT 67) and have "extensive police records" (RT 59). Indeed, they would present a greater "emergency" since they were already in the "pasture" so to speak, mixing with others and in a position to deleteriously affect the public image of the gambling industry by the ailments with which they were afflicted. With due respect, Judge Pope's misunderstanding of what appellees were seeking to do and the reason for their conduct is seen from his comment (301 F. 2d at 653), after pointing out that appellant had been convicted of a felony, "that a state may validly refuse the privilege of gambling to such a person." But plaintiff is not seeking here to establish his right to gamble! Again,

(Continued)

evidence to support any finding even remotely approaching such a conclusion, nor even one couched in milder terms. The evidence is clear -- appellees themselves conceding it (Br. 36, 38) and if they did not, they would be flying in the teeth of the record (RT 166, 173, 185, 191-192) -- that not once has appellant's presence ever created an untoward situation, save, of course, that engendered by appellees' Black Book, by reason of which appellant is before this Court.

Hohreiter v. Garrison, 81 Cal. App. 2d 384, 184 P. 2d 323, cited by appellees (Br. 29) can scarcely give them comfort. That was a license revocation case, in which the licensee was given a full hearing with all the usual rights pertaining thereto, before a hearing examiner. The question in the case was whether the entire administrative board itself must review the record or was permitted to accept the hearing officer's recommendation. Because the licensee had had a full hearing coupled with judicial review in which the Court itself rendered an independent judgment based upon a full consideration of the entire record, it was held there was no denial of due process. But the licensee did, indeed, have a full administrative hearing. Here, there was none. The fact that appellant has come to court complaining of appellees' denial of due

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6/ (Continued): most respectfully, Judge Pope's misapprehension is further shown by his suggestion (ibid) that the case involved a problem of "loaded dice, marked cards and other means of cheating or otherwise disrupting the orderly conduct of the licensed gambling." This simply has nothing to do with the case and appellees have never said nor claimed that it does. Certainly, they have adduced no evidence in that regard.

process can scarcely extricate appellees.

Appellees continue (Br. 30-31) to talk about -- in this instance, to speculate about -- what the Nevada courts might do. Again we point out, this disregards the decision by this Court in this case and also the teaching of Monroe v. Pape, 365 U.S. 167, 5 L. ed. 2d 492, 81 S. Ct. 473.

(4)

Appellant Was Denied Equal Protection of The Laws (Reply to Appellees' Point IV, pp. 31-34).

If appellees had adduced evidence to support their concepts (Br. 31), or their Black Book conduct was directed to gambling or gambling activity instead of with the right to sleep, an argument as to proper classification might be made. Whether it would be sufficient, having in mind the State's burden in such a case, would depend upon the showing made. But appellees have made no showing. Their ipse dixit, the fact that they have done it, does not substitute for proof.

Appellees' quotation (Br. 33) from 77 C. J. S. 403 is out of context. The sentence is from the C. J. S. article on the Right to Privacy. The general question being considered in the article is the right to damages when the details of one's life are made public. The particular case cited in support of the C. J. S. quotation (Hodgemen v. Olsen, 86 Wash. 615, 150 Pac. 1122) had to do with whether a person convicted of a felony could obtain a court order requiring the destruction of the pictures that were taken of him when he

entered the penitentiary and preventing their distribution to law enforcement officers. It was in relation to this, that the C. J. S. statement is made. Certainly the statement, as appellees have set it out, is too all encompassing. Conviction of a felony does not "forfeit whatever right of privacy (the convicted person) may be said to have ever possessed." It does not, for example, declare open season on the individual and allow anyone who wants to, to poke him in the nose, nor does his home lose the protection of the Fourth Amendment. It may be that the newspapers may comment upon the fact of his conviction, or law enforcement officers may circulate his picture (but cf. York v. Story, 324 F. 2d 450 [this Court, 1963], cert. den. 376 U. S. 939, 11 L. ed. 2d 659, 84 S. Ct. 794), but he remains a person, a citizen; all laws have not been repealed as to him; he does not become a Pariah.

The fact that there are laws which deprive a person convicted of a felony of the right to vote, does not meet the problem here. 7/ As yet, there are no valid laws which deprive him of the right to sleep.

Moreover, appellant has been denied equal protection in still another way. Appellees claim that their treatment of appellant is "to keep the hoodlum element away from the gaming industry." (Br. 19). Yet the record is clear that men with "extensive police records" (RT 59), who "formerly had unsavory reputations" (RT 67), and who had "criminal records" (RT 63), all of which was and

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7/ Incidentally, the validity of such laws is being tested in a case now before the California Supreme Court (Otsuka v. Hite, #L A 28537).

is known to appellees (RT 57, 59, 63), actually have gambling licenses from appellees (ibid). It hardly can be said to be equal treatment and proper classification to say that such persons may be licensed by appellees to run the very gambling establishments themselves, but that appellant may not even buy a shirt at a store open to the public on the premises.

(5)

Appellant Has Standing To Sue (Reply to Appellees' Point V, pp. 34-37).

Appellees sacrifice substance for form when they say that appellant is affected here only indirectly. It is pretty direct action for appellees to say that appellant shall be excluded from the entire premises and to tell the hotel owners to exclude him on pain of loss of license. It is, in effect, the same as though appellees had told one of their employees to seize and evict appellant from the hotels on pain of the employee's loss of job.

But even if it is considered that appellant is affected here only indirectly, that fact does not bar protection of appellant's constitutional rights. (Greene v. McElroy, 360 U.S. 474, 493, 3 L. ed. 2d 1377, 79 S. Ct. 1400; Watkins v. United States, 354 U.S. 178, 198, 1 L. ed. 2d 1273, 77 S. Ct. 1173; Boynton v. Virginia, 364 U.S. 454, 5 L. ed. 2d 206, 81 S. Ct. 182). Indeed the civil rights act by its very terms answers appelles' indirection point. It says (42 U.S.C. 1983): "Every person who ... subjects, or causes to be subjected ... shall be liable...." (emphasis added).

Webb v. State University of New York, 125 F. Supp. 910 (ND NY 1954), app. dism. 348 U.S. 867, 99 L. ed. 683, 75 S. Ct. 113, the only case relied upon by appellees, is inapposite. Suffice to say that appellees' directive to the licensees here was not merely "incidental".

The fact that the appellees set the action in motion, only to be carried out by others, does not prevent appellant, who was affected thereby, from securing redress or relieve the appellees of their responsibility for causing the damage. (NAACP v. Alabama, 357 U.S. 449, 463, 2 L. ed. 2d 1488, 1500, 78 S. Ct. 1163).

In Schempp v. School District of Abington, 177 F. Supp. 398 (ED Pa. 1959), a suit under the Federal Civil Rights Act, the state statute required the reading of the Bible in school. Failure of the school teacher to do so or to see that it was done was cause for discharge. Nevertheless, the court held that the parents of students in attendance at school had the right to, and did successfully, attack the statute.

In Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P. 2d 449, the plaintiff was ejected from the race track by the stewards thereof, similarly under pain of the track's loss of license if this were not done. Nevertheless the court sustained the plaintiff's right to sue. (See quotation pp. 43-44 of Appellant's Opening Brief; it is likewise applicable here.)

Truax v. Raich, 239 U.S. 33, 60 L. ed. 131, 36 S. Ct. 7, was a case where the state statute prohibited an employer from hiring aliens. Criminal penalties attached to the employer who so

did. No sanctions were imposed on the employees. Nevertheless in his suit in federal court for violation of constitutional right, the employee was held to have the right to sue; and sue he did -- successfully.

In Greene v. McElroy, 360 U.S. 474, 3 L.ed.2d 1377, 79 S. Ct. 1400, an employee of a private employer which had a government contract was denied security clearance by the government. As a result thereof and not at the direction or behest of the government, the private employer discharged the employee. On the question of whether the employee had any right to relief from the government's action in light of the fact that the private employer, not the government, discharged, the court said (360 U.S. at 493, f.n. 22):

> "We note our agreement with respondents' concession that petitioner has standing to bring this suit and to assert whatever rights he may have. Respondents' actions, directed at petitioner as an individual, caused substantial injuries, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152, 92 L.ed. 817, 843, 71 S. Ct. 624 (concurring opinion), and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships. Moreover, petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests. Cf. Philadelphia Co. v. Stimson, 223 U.S.

605, 56 L.ed. 570, 32 S. Ct. 340."

Accordingly, appellees' argument that appellant is entitled to no protection because he is "indirectly" affected must be rejected.

It is always an intriguing exercise to set up a straw man and then demolish it. This is what appellees have done with their example concerning the twenty-one year old (Br. 37). The difficulty is the analogy suggested is not apposite. A prohibition against a minor being in a gambling establishment is relevant to the minor's own protection and the classification is reasonable. The same cannot be said in the case at bar. As to the appellees' mistake in stating that John Doe was under 21, that is not our case here. Appellees are making no mistake; their action is quite designed.

Furthermore, appellees' suggestion of the under 21 situation, in the light of the undenied facts in this case, demonstrates the unconstitutional broadness of their conduct. In the record in this very case, it is shown that it is possible to keep unwanted persons in the form of children out of the gambling rooms and no difficulty is encountered (RT 169).

(6)

Comment on Appellees' Argument re Appellant's Opening Brief and Conclusion (Reply to pp. 37-46).

Most respectfully, we think it only proper to suggest that appellees stultify themselves (Br. 37) when they refuse to now acknowledge in the face of the uncontradicted evidence that their purpose in picking up the dice and cards was because of the presence

of appellant and to enforce the Black Book and letter (see RT 81-84). It was appellee Abbaticchio who said (RT 84) "we are going to examine their dice and cards and possibly they will get the message." The English language cannot be made plainer.

Appellees have refrained, with one exception, from discussing any of the authorities cited by appellant in his opening brief. As to some, appellees dismiss them with the phrase (Br. 40) "because they obviously involved arbitrary discrimination on the question of color alone." But this does not solve appellees' problem. The constitutional protection against arbitrary discrimination is not limited to color alone. 8/ As to the other cases, appellees say naught save as to one (Br. 43) or only that they make interesting reading (Br. 42). However, the principles enunciated by the cases cited by appellant cannot be ignored, nor will they go away simply by failing to acknowledge their existence.

Appellees' entire argument may be said to be bound up in this one sentence (Br. 41): "obvioulsy the welfare of the other citizens in the State of Nevada and the gambling industry can only be protected by keeping plaintiff and his kind away from our industry." If that be "obvious", appellees have pointed to no facts in the record to show it. But even if it be so, then their efforts

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8/ Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 81 L.ed. 1223, 57 S.Ct. 838; Smith v. Cahoon, 283 U.S. 553, 75 L.ed. 1264, 51 S.Ct. 582; Mayflower Farms v. Ten Eyck, 297 U.S. 266, 80 L.ed. 675, 50 S.Ct. 457; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L.ed. 1655, 62 S.Ct. 1110; Baker v. Carr, 369 U.S. 186, 7 L.ed. 2d 663, 82 S.Ct. 691; Gideon v. Wainwright, 372 U.S. 335, 9 L.ed. 2d 799, 83 S.Ct. 792.

must be scalpeled to that end: Keeping appellant away from the industry. The blunderbuss approach will not pass constitutional muster.

In connection with appellees' allusion (Br. 42) to the Nevada remedies, we have previously commented upon appellees' disregard of the Court of Appeals' opinion in this case and Monroe v. Pape, 365 U.S. 167, 5 L. ed. 2d 492, 81 S. Ct. 473.

We do not understand this case to involve the question of the teaching which should be given to children (see appellees' Br. 42). It does involve constitutional right and we have previously shown how appellees' concept of the right to privacy is not the law of the land.

Appellees are mistaken in their suggestion (Br. 43) that Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P. 2d 449, is, in the light of Flores v. Los Angeles Turf Club, 55 Cal. 2d 736, 361 P. 2d 921, no longer the law in California. Of course, in a sense, appellees' statement is correct because the state legislature in the light of Orloff changed the law (see 55 Cal. 2d at 741) to comport with constitutional standards, thus enabling the court to reach the conclusion it did in Flores. But absent the change in the law, Orloff remains. There is no suggestion in Flores that Orloff was wrongly decided. The court pointed out (55 Cal. 2d at 741) that this change in the law "gives rise to considerations not present in Orloff."

The difficulty with appellees' position is that appellees are covered by Orloff, except that appellant's case is here stronger because the premises here are not just a horse racing enclosure

where only horse racing is conducted, but vast acres of ground where all kinds of human activity are provided.

Appellees' reply to appellant's contention that they have made no showing of what evil would result from the law abiding presence of appellant on the non-gaming portions of the premises consists of two sentences on page 44 of their Brief. Presumably, this is the sum total of the showing appellees believe they have made. It is, we submit, inadequate. The first sentence of appellee's showing reads: "The record is replete with statements of witnesses with respect to the dangers incident to the presence of musclemen on any portion of the premises." Not one single reference to the record is given for this assertion. Appellant submits that there is no evidence in the record having any factual base whatever, of any showing of evil or danger because of the presence of appellant or, if you will, "of musclemen" on any portion of the premises, and certainly there is no evidence of danger or evil from appellant's presence on the non-gambling portion. This, of course, explains the absence of any record reference to support appellees' sweeping statement.

The second, and last, sentence of appellees in support of their "showing" of evil from appellant's presence anywhere on the premises is (Br. 44) "that the possibility of people winning large sums of money and then being robbed by people of the type appellant seems to be exists." 9/ (emphasis added).

9/ The record references cited in support are these: RT 70, lines 2-5, where appellee Abbaticchio testified as to the reasons for the promulgation of the Black Book, not as to facts of anything that had occurred, that "if an unsavory character were to

(Continued)

With due respect, we submit that "possibility" (to say nothing of there being no factual showing for the assertion) is simply not sufficient a base to permit infringement upon personal constitutional right. (Sherbert v. Verner, 374 U.S. 398, 407-408, 10 L. ed. 2d 965, 83 S. Ct. 1790, and cases cited). "Discriminations cannot be supported by mere fanciful conjecture." (Hartford Steam Boiler etc. Co. v. Harrison, 301 U.S. 459, 462, 81 L. ed. 1223, 1226, 57 S. Ct. 838). "[T]he law deals in probabilities not possibilities." (State v. McLaughlin, Oh. Ct. App. December 9, 1965, 34 U.S. Law Week 2323-2324).

Moreover, it is manifest that this argument by appellees is mere makeweight. Appellees were not concerned with the possibility of holdup -- they did not contend that ordinary law enforcement could not handle any situation -- it was the "good name of the legal gambling industry in the State of Nevada" which appellees were trying to protect (RT 33). Laudable as this objective may be, it is not sufficient, absent a factual showing, to override appellant's constitutional right, nor to excuse the State from being so sweeping in its regulation. (Sherbert, supra).

Though appellees have tried (Br. 44-45), they have not

9/ (Continued): be permitted to frequent the place, he might engineer or brand a stickup;" (emphasis added) and RT 108, lines 2-14, where Mr. Abbaticchio testified, "it was our feeling that with the records some of these people had, not all of them, the notoriety they had achieved in criminal circles, that it was not beyond the realm of possibility, that they might be pinpointing or spotting people who had made large winnings and the possibility of the information being given to confederates; that there might be holdups, the crime rate might go up. This was one of the considerations that we had in mind; yes." (emphasis added).

succeeded in explaining why "hoodlums and gangsters" (Br. 45) who have licenses are, so long as they "conduct ... themselves properly" (Br. 44) permitted to keep them and actually engage in conducting gambling under the aegis of appellees themselves, but that appellant, for the protection of the gambling industry, may not even take his wife to see a show that is open to the public.

Appellees conclude their brief by expressing wonderment (Br. 45) that appellant would have deigned to bring this suit. Appellees' words are: "it seems almost inconceivable that a man with the criminal background and obvious propensities of the plaintiff in this case would bring such an action." Appellant does not understand what appellees mean by such a statement. He does know, however, that he is a citizen of this land and entitled to be treated as such. He knows that under our system, if a man commits a crime he is charged therewith and the State produces evidence against him. And he also asserts that so long as he is violating no law nor injuring others, he has the right to be let alone. Appellees are apparently unfamiliar with the following statement by the Court of Appeals for the Second Circuit in United States v. Seeger, 303 F. 2d 478, 485(1962):

> "... We are not inclined to dismiss lightly claims of constitutional stature because they are asserted by one who may appear unworthy of sympathy. 'Once we embark upon short cuts by creating a category of the "obviously guilty" whose rights are denied, we run the risk that the circle of the unprotected will grow.' U. S. v. Tribote, 297 F. 2d 598, 604 (2d Cir. 1961)."

Appellant is entitled to protection here.

II

RESPONSE TO BRIEF OF NON-STATE APPELLEES

Preliminary Statement

The Trial Court was correct in its finding (XLVIII, CT 187) that the conduct of these appellees amounted to State action under color of State law. Whether these appellees can complain of this finding, they not having taken a cross-appeal (see Annotation: Failure to Cross-Appeal as Affecting Scope of Appellate Review, 1 L. ed. 2d 1820), need not be here decided. The finding is clearly supported by the evidence.

Appellees are incorrect in their assertion (Br. 4) that appellant is seeking damages only against them and not against the State defendants. Appellant seeks damages against both (Appellant's Op. Br., Appx. B-10-11).

A.

Appellant Was Ousted By Appellees (Reply To Appellees' pp. 4-6).

Appellees' suggestion that appellant simply acceded to a "request" by their security officer and therefore that appellant acted "voluntarily" is simply to shut one's eyes to what all can see. Appellees' own witnesses testified (e. g. RT 165) as to how appellant did not want to leave and said he would sue and started to leave when "the deputy came over".

This is sufficient. In United States v. Di Re, 332 U.S. 581, 594, 92 L. ed. 210, 220, 68 S. Ct. 222, in answer to the Government's argument that consent to a search can be inferred from an individual's failure to protest an arrest and to silently go along with the policeman to the police station, the Court said:

> " . . . [C]ourts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. . . . It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. . . .
>
> "It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. . . ."

So here. Appellant made it amply clear he was not leaving voluntarily and was reserving his right to go to court for vindication of his rights. Appellees can hardly be heard to say, on this record, that appellant was not coerced. The fact that appellant stopped short of "unseemly controversy" redounds to his credit, not to his detriment.

B.

Appellees Acted Under Color of State Law (Reply to pp. 7-16)

Appellees strain mightily to prove that which no one contests, namely that the Fourteenth Amendment does not apply to individual

action, but only to state action. But appellees do not come to grips with the question of what is state action. As Shelley v. Kraemer, 334 U.S. 1, 20, 92 L.ed. 1161, 68 S.Ct. 836, cited by appellees (Br. 7) points out:

> " ... State action, as that phrase is understood for the purposes of the Fourteenth Amendment refers to exertions of state power in all forms...." (emphasis added).

And this means, of course, "either by its legislative, its executive, or its judicial authorities." (Virginia v. Rives, 100 U.S. 313, 318, 25 L.ed. 667, 669).

Therefore, when appellees carried out the commands of the State, rather than resist same and act as individuals, they, as individuals, admittedly having no cause and no desire to oust appellant from the premises, were indeed acting for and as the State. There is no other way to look at it.

Detailed analysis of each of the cases cited by appellees would not seem to be necessary. The principle announced in Burton v. Wilmington Parking Co., 365 U.S. 715, 721, 6 L.ed.2d 45, 81 S.Ct. 856, also cited by appellees (Br. 13) demonstrates appellant's point:

> " ... Private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it...." (emphasis added).

And so there, where the only state participation was that it leased

the property which was operated as a restaurant by a private lessee for private profit who, because of his own personal predelictions, acted as he did and refused service, the court held state action was involved and the plaintiff was entitled to an order admitting him to this "private" restaurant. How much more clear is the state involvement in the case at bar when appellees acted solely at the behest of and did the bidding of the State.

It is submitted that if State action be involved by a restaurant owner in a case such as Lombard v. Louisiana, 373 U.S. 267, 10 L. ed. 2d 338, 83 S. Ct. 1122, then, of course, state action is involved at bar through these appellees. In Lombard, a restaurant owner asked the individuals, three Negroes and one White, to leave. When they did not, the manager called the police and the defendants were charged with malicious mischief. 10/ Although there was no state statute, nor any city ordinance, the court found the restaurant owner's conduct to be state action simply because the Superintendent of Police had publicly stated that the student sit-in demonstrations were not in the public interest and that the police department would enforce all laws. In addition the Mayor of New Orleans had publicly stated that he had directed the superintendent of police to allow no more sit-in demonstrations and that they should cease and be prohibited.

The Court said that "a state, or a city, may act as authoritatively through its executive as through its legislative body." (373

10/ Various charges have been leveled in the sit-in cases, e.g., trespass, disturbing the peace, etc.

U. S. at 273) and held the restaurant owner's conduct to be State action.

Similarly, then, is appellees' conduct here.

This is so, even under the Civil Rights Cases themselves, 109 U. S. 3, 17, 27 L. ed. 836, 841: "[T]he wrongful act of an individual [is not state action] . . . if not sanctioned in some way by the State, or not done under state authority . . .[It is state action, however, if] the evil or wrong actually committed rests upon some state law or state authority for its exercise and perpetration." See also, generally, Abernathy, Expansion of the State Action Concept under the 14th Amendment, 43 Cornell L. Q. 357, 377; Lewis, The Meaning of State Action, 60 Columbia L. R. 1083, 1089; Van Alstyne & Karst, State Action, 14 Stan. L. R. 3.

The thrust of appellees' argument seems to be (Br. 3-4) that because they acted pursuant to the coercion of the State defendants, they are not liable for the damage inflicted upon appellant. This type of contention was early laid to rest by the Supreme Court in Little v. Barreme, 2 Cranch (U. S.) 170, 177, 2 L. ed. 243, 246, a case involving a suit for damages against a Sea Captain who seized a ship acting on orders from the President of the United States. Speaking for the Court, Mr. Chief Justice Marshall said:

> "I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. ... That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system,

appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. ... But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

See also, Kilbourn v. Thompson, 103 U.S. 168, 26 L. ed. 377.

C.

Diversity of Citizenship Furnishes an Alternative Ground For Recovery by Appellant Against the Non-State Appellees.

Although we believe incorrect, as we have shown, the non-State appellees' argument that because they acted pursuant to the instructions of the State appellees, this, somehow, makes their conduct not under color of State law, yet if that be so, it does not aid them. This, because the non-State appellees are then thrown into the situation of having acted as private individuals who, under Nevada law, are liable to appellant for their conduct.

Appellees concede (Br. 1) that the Trial Court had jurisdiction, as it found (CT 174), under the diversity of citizenship section. (28 U.S.C. 1332 [a] [i]). Nevada law therefore applies.

Appellees run a hotel to which the public is invited. They

refused service to appellant although he was conducting himself properly. Thus, the case is simply that of the inn-keeper's obligation to afford service. Under Nevada law, appellant is entitled to recover.

Section 651.020 N.R.S., provides:

> "Every owner or keeper of any hotel, inn, motel, motor court or boarding house or lodging house in this state shall have the right to evict from such premises anyone who acts in a disorderly manner or who destroys the property of any such owner or keeper or who causes a public disturbance in or upon such premises."

Section 233.010 N.R.S., provides in part:

> "Declaration of Public Policy of State....
>
> "It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all people of the state and to foster the right of all persons reasonably to seek, obtain and hold employment and housing accommodations and reasonably to seek and be granted service in places of public accommodation without discrimination, distinction or restriction because of race, religious creed, color, national origin or ancestry." 11/

11/ Apparently (RT 546) this section was added in 1961. This does not of course detract from appellant's innkeeper argument based upon the other Nevada statutes nor, indeed, does this mean that prior to the 1961 enactment, Nevada law was to the contrary. Indeed, all the section did was codify in the employment, housing and public accommodations fields what had always been the law as to innkeepers. Brown v. Brandt (1902), I.K.B. 696, 698; Bowlin v. Lyon, 67 Iowa 536, 538-539, 25 N.W. 766, and cases cited infra at the end of the last paragraph of this section.

Section 1.030 N.R.S. provides:

"The common law of England so far as it is not repugnant to or in conflict with the Constitution and laws of the United States or the Constitution and laws of this state shall be the rule of decision in all the courts of this state."

And Section 447.010 N.R.S. states:

"Hotel Defined":

"Every building or structure kept or used as or held out to the public to be a place where sleeping or rooming accommodations are furnished to the transient public, whether with or without meals, shall, for the purpose of this chapter, be deemed to be a hotel and whenever the word 'hotel' shall occur in this chapter it shall be deemed to include a lodging house or rooming house where transient trade is solicited."

Finally, In re Breckenridge, 34 Nev. 275, 277, 118 Pac. 687, holds that a hotel in Nevada is an inn.

Accordingly, the non-state appellees, having failed to discharge their innkeeper responsibility to appellant, are liable to him for damages. (3 Blackstone's Commentaries 164; Civil Rights Cases, 109 U.S. 325; Mateer v. Brown, 1 Cal. 221, 230, 52 Am. Dec. 303; Bowlin v. Lyon, 67 Iowa 536, 538-539, 25 N.W. 766; Kisten v. Hildebrand, 48 Ky. (9 B. Mon.) 72, 74, 48 Am. Dec. 416; Atwater v. Sawyer, 76 Me. 539; Markham v. Brown, 8 N.H. 523, 528, 31 Am. Dec. 209; DeWolf v. Ford, 193 N.Y. 397, 401, 86 N.E. 527; Grinnell v. Cook, 3 Hill (N.Y.) 485, 488, 38 Am. Dec. 663;

Bennet v. Mellor (1793), 5 T.R. 273, 276, 101 Eng. Rep. 154, 155; Robins & Co. v. Gray (1895), 2 Q.B. 501, 504, 507, 508. See also, Hervey v. Hart, 149 Ala. 604, 42 So. 1013.)

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

WILLIAM B. BEIRNE

A. L. WIRIN

FRED OKRAND

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Fred Okrand

FRED OKRAND